Supreme Court, U. S.
FILED
OCT 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-532

THE STATE OF NEW JERSEY, ANCORA PSYCHIATRIC HOSPITAL, GREYSTONE PARK PSYCHIATRIC HOSPITAL, TRENTON PSYCHIATRIC HOSPITAL and NEW JERSEY NEUROPSYCHIATRIC INSTITUTE, and THE VINELAND STATE SCHOOL,

Petitioners,

v.

JOHN T. DUNLOP, Secretary of Labor,
United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

THE STATE OF NEW JERSEY, ANCORA PSYCHIATRIC HOSPITAL, GREYSTONE PARK PSYCHIATRIC HOSPITAL, TRENTON PSYCHIATRIC HOSPITAL and NEW JERSEY NEUROPSYCHIATRIC INSTITUTE, and THE VINELAND STATE SCHOOL,

Petitioners,

v.

JOHN T. DUNLOP, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 4, 1975.

Jurisdiction

The judgment and opinion of the United States Court of Appeals for the Third Circuit was filed on August 4, 1975. It was ordered that the judgment of the United States District Court be affirmed with respect to its determination that the Fair Labor Standards Act has been violated by the State of New Jersey and that money damages be awarded for certain of its employees. It was concluded that regulatory provisions of the Secretary of Labor concerning the time for the payment of compensatory time off to state employees are within his authority under the Act and do not constitute an invasion of state sovereignty under the Tenth Amendment to the United States Constitution. It was also held that the Eleventh Amendment to the United States Constitution does not preclude an award of money damages to the Secretary of Labor for the direct benefit of state employees. The cause was remanded to the District Court for a determination of the applicable statute of limitations and a computation and determination of the damage award.

The judgment and opinion of the Court of Appeals presents novel and important questions of constitutional law dealing with the Tenth and Eleventh Amendments to the Federal Constitution which are essential to the further conduct of the case before the District Court. The successful resolution of the contentions advanced by the petitioner will render a final judgment of the District Court unnecessary.

Review by certiorari has often been held to be appropriate in similar circumstances, e.g., *Land* v. *Dollar,* 330 U.S. 731, 734 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 685 (1949). In *United States* v. *General Motors Corp.,* 323 U.S. 373, 377 (1945), certiorari was granted by this Court where a condemnation

proceeding was remanded for the trial of the value of the interest taken, since review of the judgment of the Court of Appeals was fundamental to the further conduct of the case and its correctness depended on the scope and meaning of the Fifth Amendment to the United States Constitution. This case should similarly be reviewed at this time to resolve the determinative issues of constitutional law involved in advance of the entry of a final judgment by the District Court.

The jurisdiction of the Court is, therefore, invoked under 28 U.S.C. § 1254(1) to review a judgment of the Court of Appeals by the issuance of a writ of certiorari.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix C to this petition. The opinion of the United States District Court for the District of New Jersey, reported at 364 F. Supp. 156 (1973), appears in Appendix F to this petition.

Statutes and Regulations Involved

The pertinent statutory provisions, both federal and state, are 29 U.S.C. § 207, 29 U.S.C. § 217, N.J.S.A. 52: 14-17.13, which are set forth in Appendix G to this petition. The pertinent federal regulatory provision is 29 C.F.R. 778.106 which is set forth in Appendix G to this petition.

Questions Presented

1. Do the regulatory provisions of the Secretary of Labor which prohibit the award of compensatory time off

to State employees of hospitals and institutions outside of the work week in which the overtime is earned exceed the authority of the Department of Labor under Section 207 of the Fair Labor Standards Act, 29 U.S.C. § 207?

2. Is an administrative construction by the Secretary of Labor of Section 207 of the Fair Labor Standards Act, 29 U.S.C. 201 et seq., which precludes a legislatively created system for the award of compensatory time off as an alternative to cash overtime payments to thousands of employees in State hospitals and institutions, an unwarranted invasion of state sovereignty violative of the Tenth Amendment of the United States Constitution?

3. Does the Eleventh Amendment to the United States Constitution as interpreted in *Edelman* v. *Jordan,* 415 U.S. 651 (1974), preclude the imposition of retroactive monetary relief against a state by a federal court in a suit brought by the Secretary of Labor as a representative of and for the direct benefit of state employees in New Jersey hospitals and institutions?

Statement of the Case

On October 1, 1971 the Secretary of Labor brought a suit in the United States District Court for the District of New Jersey under the provisions of section 217 of the Fair Labor Standards Act to enjoin alleged future violations of sections 206, 207 and 215(a)(2) of the Act by the State of New Jersey and its various hospitals and to restrain the alleged continued withholding of minimum wages and overtime compensation due to state employees. On October 1, 1973 the United States District Court issued its opinion holding that the New Jersey state statutory and regulatory overtime program which provides for compensatory time off as an alternative to the payment of cash overtime during the pay period in which it is earned violated the Fair Labor Standards Act, as construed by the Secretary of Labor, since it failed to provide for the prompt payment of overtime required by his interpretive regulations and opinion letters. On December 11, 1973 an order of partial summary judgment and stay of judgment was filed by the court. The State of New Jersey was enjoined from following its statutorily established overtime program and ordered to make retroactive payments for overtime compensation owing to state employees.

The State of New Jersey filed a notice of appeal on February 11, 1974 with the United States Court of Appeals for the Third Circuit. On August 4, 1975 the United States Court of Appeals filed its opinion and judgment and with minor modifications affirmed the order of partial summary judgment entered by the United States District Court. The court held that the State's statutory and administrative practice to award employees compensatory time off was violative of section 207 of the Fair Labor Standards Act, and the Secretary of Labor's regulations and administrative opinions which construe the Fair Labor Standards Act in this fashion are an appropriate exercise of his delegated responsibilities. The Court further held that the Eleventh Amendment to the United States Constitution does not preclude the recovery of retroactive overtime compensation due and owing to affected employees by a suit brought by the Secretary of Labor. In a concurring opinion filed by Circuit Judge Adams, it was stated that there was some doubt as to the congressional authorization for an award of retrospective overtime compensation in addition to injunctive relief to effectuate compliance of the states with the Fair Labor Standards Act. It was also noted that the Supreme Court has declared only in dictum that the

Eleventh Amendment to the United States Constitution does not foreclose the Secretary of Labor from securing a money judgment for unpaid overtime compensation on behalf of state employees. However, he concluded that it would be inappropriate for the Court of Appeals as opposed to this Court to enter a ruling inconsistent with this dictum.

The Court of Appeals remanded the matter to the United States District Court for a redetermination of the amount of money damages due and owing to affected state employees and on August 27, 1975 entered an order to stay the issuance of its mandate until and including September 24, 1975.

Reasons for Granting the Writ

The questions presented are substantial and important.

This appeal involves the validity and constitutionality of regulatory provisions and administrative interpretations of section 207 of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., by the Secretary of Labor which prohibit a state from paying its employees for overtime in the form of compensatory time off at premium rates at some period of time other than the pay period in which it is earned. The impact of these regulatory and administrative directives of the Secretary of Labor on state hospitals and institutions subject to the coverage of the 1966 amendments to the Fair Labor Standards Act is enormous. A state statutory scheme for the award of compensatory time off to thousands of state employees under N.J.S.A. 52:14-17.13 is effectively nullified. The management and operation of state institutions are drastically affected and significant additional fiscal strains are

placed on the State's already limited financial resources. The administrative construction of the Act by the Department of Labor effectively eliminates the exclusive ability of state hospitals and institutions consistent with its sovereign powers under the Tenth Amendment to carry out its legislatively mandated responsibilities.

This appeal also involves the constitutional validity under the Eleventh Amendment to the United States Constitution of suits brought by the Secretary of Labor on behalf of and for the direct pecuniary benefit of state employees to secure restitutionary monetary relief which employees could not themselves obtain by reason of a state's protected immunity from suit. The impact of the recent decisions of the Court in *Employees* v. *Missouri Department of Public Health and Welfare,* 411 U.S. 279 (1973), and *Edelman* v. *Jordan,* 415 U.S. 651 (1974), are directly implicated. The meaning and scope of the Eleventh Amendment presents issues of tremendous importance to all states. Indeed, the validity and constitutionality of the Department of Labor's interpretive regulations in its application to the use of the compensatory time off by the states has been drawn into question by the State of California in its brief filed with this Court in *National League of Cities* v. *Brennan,* Nos. 74-878 and 74-879. These issues are thus by their very nature of substantial importance to all states subject to federal regulations under the Fair Labor Standards Act.

A

The regulations and administrative interpretations of the Secretary of Labor which foreclose the award of compensatory time off during a pay period other than in which it is earned is neither supported nor compelled by Section 207 of the Fair Labor Standards Act.

Since 1966 employees of state hospitals and other health care facilities have been subject to the wage and hour provisions of the Fair Labor Standards Act and, in particular, the overtime provisions of the Act. In 1968 the New Jersey Legislature in order to provide the most beneficial overtime program for state employees enacted Laws of 1968, c. 52, (N.J.S.A. 52:14-17.13), which provided for either cash overtime for hours worked in excess of the normal work week or, in the alternative, the award of compensatory time off at the rate of 1½ hours for each hour worked in excess of the normal work week. This program was implemented on a uniform basis throughout all of the agencies and institutions of state government. However, the Court of Appeals held that this established statutory and regulatory scheme for the provision of overtime on this basis is violative of section 207 of the Fair Labor Standards Act, as interpreted by the Secretary of Labor, since it allows for the payment of compensatory time off during a period outside of the normal pay period during which the overtime is earned.

The Wage and Hour Administrator has issued Opinion Letters Nos. 868 (Oct. 1968) and 913 which specifically concern the manner for the payment of compensatory time off by the states. Letter 913 states:

"The overtime compensation requirements of the Act are discussed in Interpretative Bulletin, Part 778. Section 778.106 indicates that the payment of both the minimum wage and overtime compensation due an employee must ordinarily be made at the regular payday for the period in which the work was performed. An employer may not credit an employee with compensatory time (even at a time and one-half rate) for overtime earned which is to be taken at some mutually agreed upon later date subsequent to the end of the pay period in which the overtime was earned, rather than pay cash for the overtime as it is earned. However, it is permissible for the employer employing one at a fixed salary for a fixed workweek to lay off the employee a sufficient number of hours during some other week or weeks of the pay period to offset the amount of overtime worked (i.e. at the time and one half rate) so that the desired wage or salary for the pay period covers the total amount of compensation, including overtime."

These administrative interpretations of the Act by the Administrator concerning prompt payment of overtime and compensatory time off by states subject to his jurisdiction are neither compelled by the literal terms of section 207 nor supported by the underlying congressional purposes in the extension of the Act's overtime provisions to the states.

The main goal of the Fair Labor Standards Act's overtime provision is to generally broaden employment by providing a financial disincentive to employers through premium rates for overtime. These purposes are effectively served in the state's hospitals for the care of the mentally ill by the payment of compensatory time off at

some later time. The need for a constant level of personnel and health care services in the state's overcrowded institutions necessitates additional employees to fill gaps created by those enjoying compensatory time off. There are no slack or seasonal periods in the care for the mentally disturbed and retarded. A delayed scheduling of the payment of compensatory time off will therefore not defeat the broadening of employment objectives of the Act. The rigid immediacy of payment requirement imposed by the Administrator in his interpretive opinion dealing with state institutions subject to the 1966 amendments to the Act are therefore neither realistically compelled nor supported by the congressional objectives in furtherance of the Act. The Court of Appeals, however, erroneously deferred to the interpretive rulings of the Administrator and thereby abdicated its judicial responsibility to the unfettered discretion of the Department of Labor. *Cf. Mitchell* v. *H. B. Zachary Co.*, 362 U.S. 310 (1960).

The holding of the court below, furthermore, stands in sharp contrast with the Court's approach to the construction of the provisions of the Fair Labor Standards Act. In *Kirschbaum* v. *Walling*, 316 U.S. 517 (1942), it was concluded that the process of accommodation between federal regulatory legislation and those functions reserved for the states necessitates that the specific terms of and legislative history behind the Fair Labor Standards Act evince a clear congressional intent to limit state action. As stated by Justice Frankfurter:

> ". . . The history of congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national

> authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." *Kirschbaum* v. *Walling, supra,* 521, 522.

The Court of Appeals failed to heed this admonition in its application of the restrictive regulations of the Department of Labor to the State of New Jersey. A writ of certiorari should therefore issue to enable this Court to determine whether the interpretive regulations and opinion letters which foreclose a state's legislative overtime program for the use of compensatory time off exceed the statutory authority of the Secretary of Labor.

B

The interpretive regulations and opinion letters of the Secretary of Labor which preclude a state statutory system for the payment of overtime to thousands of employees in state institutions is an unwarranted invasion of state sovereignty under the Tenth Amendment to the United States Constitution.

It is established that the exercise of congressional power under the Federal Constitution is limited by the principles of state sovereignty inherent in our federal system of government and by the Tenth Amendment which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Thus, federal power has been construed by the Court to accommodate both "assertions of new federal authority and historic functions of the individual states." *Kirschbaum* v. *Walling, supra,* at 520. *Cf. San Antonio* v. *Rodriguez,* 411 U.S. 1 (1973); *Johnson* v. *Louisiana,* 406 U.S. 356, 376 (1972); *Pointer* v. *Texas,* 380 U.S. 400, 414 (1965); *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 295 (1936). An exemplary recognition of the respective powers of the national and state governments under a federal system of government was expressed in *New York* v. *United States,* 326 U.S. 572 (1946). The Court agreed that "there are, . . . State activities . . . that partake of uniqueness from the point of view of intergovernmental relations," 326 U.S. at 582, so that the national government may not "interfere unduly with the state's performance of its sovereign functions of government," 326 U.S. at 587, because "[t]he notion that the sovereign position of the states must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." 326 U.S. at 594. Also, in *Younger* v. *Harris,* 401 U.S. 37, 44 (1971), the Court more recently stressed the need for a proper respect of state functions "and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways . . ."

These fundamental constitutional precepts are violated by the harsh and unyielding application of federal wage and hour regulations to the overtime practices of state hospitals and institutions. In particular, the interpretive regulations and opinion letters of the Department of Labor concerning the time for the payment of overtime compensation to state employees is a form of pervasive federal interference with the conduct of the traditional functions of the states. The undeniable impact of the

federal interpretive regulations works to the disadvantage of both the state as an employer and in its continued maintenance of these institutions mandated by state law. The very nature of the state hospitals which provide for the care of the mentally disturbed requires the provision of constant care and supervision. It is a practical impossibility for these institutions to arrange for payment of compensatory time off within the pay period as mandated by the Secretary of Labor and, at the same time, provide the critical and necessary medical and health services required by law. There is no doubt that the effect of these administrative interpretations of this congressional enactment intrudes to the very essence of state sovereignty over its own legislatively created agencies of government.

This case, therefore, raises serious questions of enormous significance and importance to the maintenance of the concept of harmonious federalism between the federal and state governments and the immunity of indispensable sovereign functions under the Tenth Amendment from unwarranted federal regulation. The Court of Appeals has failed to appreciate the significance of this issue. It, rather, has sanctioned an unprecedented interference with the operations of state governments premised exclusively on administrative interpretations unsupported by explicit or definitive congressional authorization.

These general considerations of state immunity were involved to a great extent in the Court's opinion in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968). Although the general extension of the Fair Labor Standards Act to the states was found to be consistent with the Tenth Amendment, this Court at that time refused to be drawn into an abstract discussion of all of the complex issues involved by this new expansion of federal power to the states. It recognized the impossibility of deciding these considera-

tions in advance of particular facts, stated claims and identified plaintiffs and defendants and reserved questions of state immunity for appropriate future cases. *Maryland* v. *Wirtz,* at 200. Recent amendatory legislation has now broadened the scope of the Act even further in the public sector and similar issues to those posed in this appeal are pending in *National League of Cities* v. *Brennan, supra.*

These significant constitutional issues of broad concern to all states are now squarely placed before this Court in an appropriate proceeding. A writ of certiorari should issue to allow for a thorough review of these fundamental questions of far reaching constitutional dimensions.

C

The Court of Appeals has misconstrued the import of this Court's decision in *Edelman* v. *Jordan,* 415 U.S. 651 (1974), and earlier case law, in concluding that the Eleventh Amendment does not bar the award of retroactive monetary relief against the State of New Jersey in the context of a suit brought by the Secretary of Labor on behalf of state employees.

It is settled that private citizens may not institute a suit against a state in the federal courts to recover monetary damages consistent with the Eleventh Amendment to the United States Constitution. *Employees* v. *Missouri Department of Public Health and Welfare, supra; Kennerott Copper Corp.* v. *State Tax Comm'n,* 327 U.S. 573 (1946). It is also established that the Eleventh Amendment is no bar to a suit by a state or by the United States against a state. *Monaco* v. *Mississippi,* 292 U.S. 313 (1934). However, it has been well established that

government may not institute a suit *parens patriae* and successfully invoke the jurisdiction of the federal courts to assert the claim of its individual citizens who are the real parties in interest. *Hawaii* v. *Standard Oil Company of California,* 405 U.S. 259 (1972); *Oklahoma* v. *Cook,* 304 U.S. 387 (1938); *Oklahoma* v. *Atchison, T. & S.F. R. Co.,* 220 U.S. 277 (1911); *Kansas* v. *United States,* 204 U.S. 331 (1907); *Louisiana* v. *Texas,* 176 U.S. 1 (1900); *New Hampshire* v. *Louisiana,* 108 U.S. 76 (1883).

In *New Hampshire* v. *Louisiana, supra,* the State of New Hampshire brought a suit to recover the debts owed to its individual citizens by another state. This Court correctly pointed out that a state could not avoid the judicial clauses of the Federal Constitution by simply assuming the prosecution of the debts owing to its citizens. Similarly, in *Louisiana* v. *Texas, supra; Oklahoma* v. *Atchison, T. & S.F. R. Co., supra; Oklahoma* v. *Cook, supra;* and *Hawaii* v. *Standard Oil Company of California, supra,* this Court reemphasized the proposition that a state may not seek recovery for the benefit of individuals who are the real parties in interest in order to properly invoke the original jurisdiction of this Court.

The federal government can no more be used to assert the monetary claims of its citizens and avoid the Eleventh Amendment than can the states as *parens patriae.* The fact that a suit is brought by the Secretary of Labor to enforce a federal statute does not take this case outside of the constitutional ban, where money damages are recovered by the federal government as a representative of and directly for state employees. Nevertheless, in dictum in language not dispensable to its holding in *Employees* v. *Missouri, supra,* this Court stated that the Secretary of Labor could, consistent with the Eleventh Amendment, obtain retroactive monetary relief for state employees in a federal court under the Fair Labor Stand-

ards Act. This dictum is clearly inconsistent with earlier case law. A review of this question is needed to resolve a patent inconsistency in the judicial interpretation of the constitutional role of the government as *parens patriae* for its citizens in the federal courts.

Subsequent to *Employees* v. *Missouri, supra,* this court held that remedial power of a federal court to award prospective injunctive relief against a state under *Ex parte Young,* 209 U.S. 123 (1908), could not be constitutionally extended to include retroactive injunctive relief to compel the disbursement of state funds from a state treasury under federal regulations implementing a federal-state program of public assistance. *Edelman* v. *Jordan, supra.* The judicial imposition of retroactive monetary relief against the state in a suit brought by the Secretary of Labor to recover for state employees the relief which they could not themselves recover by reason of the Eleventh Amendment is logically indistinguishable from the judgment reversed by this Court in *Edelman.* The Court of Appeals clearly misapplied this Court's determination in *Edelman* to the present situation.

This Court should, therefore, grant a writ of certiorari to determine whether the Court of Appeals has misconceived or misapplied the import of this Court's decision in *Edelman,* to reconcile that decision with the Court's dictum in *Employees,* and to resolve an inconsistency with earlier case law on the role of a government as *parens patriae* for its citizens in the federal courts. The need for clarification of these significant issues was pointedly suggested by Judge Adams in his concurring opinion in the Court of Appeals:

> "The Supreme Court, however, has declared albeit only in dictum, that the sovereign character of the states does not foreclose the Secretary of Labor from obtaining for the benefit of state employees a money judgment for unpaid overtime compensation, thereby achieving indirectly what the state employees could not accomplish for themselves. It seems inappropriate for this court, as opposed to the Supreme Court, to enter a ruling which would be in derogation of the import of such language."

These issues are in need of further elucidation and are, therefore, particularly worthy of resolution by this Court.

CONCLUSION

For the reasons set forth herein, the petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Order Staying the Issuance of Mandate

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1289

JOHN T. DUNLOP, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee,

vs.

THE STATE OF NEW JERSEY, *et al.*,

Defendants-Appellants.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 24, 1975.

BIGGS
Judge

Dated: August 27, 1975

APPENDIX B

Judgment of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1289

JOHN T. DUNLOP, Secretary of Labor,
United States Department of Labor

vs.

THE STATE OF NEW JERSEY, ANCORA PSYCHIATRIC HOSPITAL, GREYSTONE PARK PSYCHIATRIC HOSPITAL, TRENTON PSYCHIATRIC HOSPITAL and NEW JERSEY NEUROPSYCHIATRIC INSTITUTE, and THE VINELAND STATE SCHOOL,

Appellants

(D. C. Civil Action No. 1457-71)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: BIGGS, ADAMS and GARTH, *Circuit Judges*

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 11, 1973, be, and the same is hereby affirmed with respect to its determinations that FLSA was violated and that restitution damages should be awarded. That portion of the said judgment requiring back payments from February 1, 1969 is hereby vacated, and the cause is hereby remanded to the said District Court for a modification not inconsistent with the opinion of this Court and for a determination of the damage award, all in accordance with the opinion of this Court.

ATTEST:

THOMAS QUINN
Clerk

August 4, 1975

APPENDIX C

Opinion of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1289

JOHN T. DUNLOP, Secretary of Labor,
United States Department of Labor

vs.

THE STATE OF NEW JERSEY, *et al.*,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D. C. Civil No. 1457-71)

ARGUED OCTOBER 8, 1974

Final Submission May 5, 1975

Before: BIGGS, ADAMS and GARTH, *Circuit Judges*

Appendix C

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OPINION OF THE COURT

(Filed—August 4, 1975)

BIGGS, *Circuit Judge.*

The basic issue presented on this appeal is whether the practice of certain New Jersey state institutions in implementing a New Jersey statute[1] authorizing overtime com-

[1] N.J.S.A. 52:14-17.13:

"The work week for basic annual salary for employees in the State service, insofar as practicable and except as

(Footnote continued on following page)

pensation to state service employees in the form of compensatory time off comports with the requirements of § 7 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207. The district court entertained this question on partial cross-motions for summary judgment[2] and ruled that the compensatory time off program was invalid as violative of the FLSA. Subsequently, it permanently enjoined appellants from violation of § 15(a)(2) of the FLSA[3] by continuation of the compensatory time off program as previously practiced by these institutions, ordered retroactive payments for compensation owed state employees, and entered final judgment on this issue pursuant to Rule

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(Footnote continued from preceding page)

provided in section 2 of this act, shall not be more than 40 hours; and, notwithstanding any inconsistent provisions of law, any employee in the State service who is authorized or required to work in any week more than the hours of work established as the regular and normal work week for that class or agency shall be eligible to receive, at the discretion of the department head with the approval of the State Treasurer, the President of the Civil Service Commission and the Director of the Division of Budget and Accounting in the Department of the Treasury, either (1) compensation for the hours worked in excess of the established work week for that class or agency at a rate representing 1 1/2 times the individual's hourly rate calculated by a proration of the annual salary rate of the individual employee, or (2) *compensatory time off at the rate of 1 1/2 hours for each hour worked in excess of the established work week for that class or agency.*" (emphasis added).

[2] Rule 56, F.R. Civ. P., 28 U.S.C.

[3] 29 U.S.C. §215(a)(2). This subsection prohibits, *inter alia,* violation of 29 U.S.C. §207.

54(b), F.R. Civ. P.[4] We affirm the district court's decision that the FLSA was violated and its award of restitution damages. We are, however, required to vacate that portion of the district court's order specifying the time from which retroactive payments are to be computed and to remand this portion of the order to the district court for a consideration of the applicable statute of limitations.

I.

The Fair Labor Standards Act, enacted in 1938, required employees "engaged in commerce or in the production of goods for commerce" to be paid a minimum hourly wage, 29 U.S.C. §§ 206(a) and 207(a) (§§ 6(a) and 7(a), 52 Stat. 1062, 1063).[5] It likewise prescribed that such employment be regulated by premium payrates for work in excess of a certain number of hours per workweek. 29 U.S.C. § 207(a). The Congressional purpose in imposing these standards was, and remains, two-fold: (1) to effect greater employment by providing a financial disincentive to employers who require overtime hours; and (2) to compensate employees for the burden of a lengthier work-

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[4] The district court stayed enforcement of its decision and suspended its permanent injunction during the pendency of this appeal.

[5] Congress amended the FLSA in 1961 to expand its compass to include any employee "who in any workweek is engaged in commerce or in the production of goods for commerce . . .". In 1966, the FLSA's coverage was further enlarged by addition of the modifying clause "or is employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. §§206(a) and 207(a).

week. *Bay Ridge Operating Co.* v. *Aaron,* 334 U.S. 446, 460 (1948); *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 40 (1944). See also 29 U.S.C. § 202. In order to ensure that these statutory goals would not be subverted by construing the FLSA either to allow employers to evade more stringent state standards or to permit the freezing of wage rates at the minimum hourly wage, Congress specified, § 18, 52 Stat. 1069; now, 29 U.S.C. § 218(a):

> "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter."

Originally, the FLSA exempted the federal and state governments and their political subdivisions from compliance with its provisions. § 3(d), 52 Stat. 1060. In 1966, however, Congress amended the FLSA to encompass certain activities of the states and their political subdivisions, including operations of hospitals, schools, and institutions.

At that time, the following pertinent changes were engrafted upon 29 U.S.C. § 203:

> "(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." (now cited as Act of Sept. 23, 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 831).
>
> . . .
>
> "(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which— . . .
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> (4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a pre-school, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school

is public or private or operated for profit or not for profit."[6]

These amendments had an undeniable impact on the financial responsibilities of those states involved in such operations. In response to this and other fiscal pressures exerted by its own laws relating to compensation of state employees, the state of New Jersey amended N.J.S.A. 52:14-17.13 to provide for overtime compensation in the form of either wages at a rate one and one-half times the

[6] In 1974, Congress again revised 29 U.S.C. § 203. These amendments, effective May 1, 1974, do not affect this appeal since it concerns acts prior to that date. We do note, however, that subsection (d) now reads:

> "(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

Similarly, the 1974 amendments added subsection s(5) to 29 U.S.C. §203. That addition includes the "activity of a public agency" as an "[e]nterprise engaged in commerce. . . ." A three-judge panel has considered a challenge to the 1974 amendments on the ground Congress had exceeded its commerce power and upheld the constitutionality of the 1974 amendments to the FLSA. The National League of Cities, et al. v. Brennan, Civil No. 74-1812 (D. D.C. December 31, 1974). The Supreme Court has granted review, 43 U.S.L.W. 3411-3412 (U.S. January 27, 1975) (Nos. 74-878 and 74-879). Oral argument in these appeals was scheduled before the Supreme Court on April 16, 1975. 43 U.S.L.W. 3537-3539 (April 8, 1975).

hourly rate or compensatory time off at the rate of one and one-half hours for each overtime hour.[7]

Pursuant to his authority under 29 U.S.C. §§ 211 and 217, the Secretary of Labor filed suit against the state of New Jersey and various state hospitals to enjoin violations of the overtime provisions of the FLSA. The Secretary contends that the compensatory time off provisions of the New Jersey statute, as applied to the employees of these state hospitals, violate §7 of the FLSA, 29 U.S.C. § 207, because the time off is not afforded during the same pay period as earned. We are constrained to agree.[8]

II.

The FLSA's overtime compensation provision is contained in 29 U.S.C. § 207(a)(1) which reads:

> "Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the

[7] As originally enacted in 1951, N.J.S.A. 52:14-17.13 provided either compensatory time off or wages at a statutorily formulated rate as compensation for overtime. In 1966, the statute was revised, and it deleted the compensatory time off provision effective July 1, 1967. L. 1966, c. 323, §1. The statute was placed in its present form in 1968, effective June 5, 1968, when it was altered in order to provide once again for alternative methods of overtime compensation. L. 1968, c. 52.

[8] On this appeal, neither party contests the district court's adjudication on the basis of partial cross-motions for summary judgment. Without further discussion, we agree that, in the absence of disputed issues of fact, the district court proceeded properly in adjudicating those motions.

production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours *unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.*" (emphasis added).

Neither this section nor the statutory definitions contained in the FLSA, 29 U.S.C. § 203, define or mandate the form which overtime compensation is to take. Simply stated, the FLSA leaves unresolved the question of whether overtime compensation must take the form of monetary payments or whether it may assume the form of other types of remuneration, such as time off. This statutory reticence does not, however, render us guideless. Indeed, the FLSA is continually supplemented by the administrative interpretations and regulations of the Administrator of the Wage and Hour Division of the Department of Labor. See 29 U.S.C. § 204. While these administrative rulings do not have the binding effect of law, we may not only properly resort to them for guidance but should also accord them the weight, persuasiveness, and respect to which the expertise of their formulators entitles them. See e.g., *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 182 (1946); *Irwin* v. *Clark*, 400 F.2d 882, 884 (9th Cir. 1968), cert. denied 393 U.S. 1062 (1969); *Goldberg* v. *Sorvas*, 294 F.2d 841, 847 (3d Cir. 1961).

The Wage-Hour Administrator has considered the question of compensatory time off as a form of overtime compensation. In Opinion Letter No. 913 (December 27, 1968), he explained:

"And employer may not credit an employee with compensatory time (even at a time and one-half rate) for overtime earned *which is to be taken at some mutually agreed upon later date subsequent to the end of the pay period in which the overtime was earned, rather than pay cash for the overtime as it is earned.* However, it is permissible for the employer employing one at a fixed salary for a fixed workweek to lay off the employee a sufficient number of hours *during some other week or weeks of the pay period* to offset the amount of overtime worked (i.e. at the time and one-half rate) so that the desired wage or salary for the pay period covers the total amount of compensation, including overtime." (emphasis added).[9]

We conceive this restrictive endorsement of compensatory time off to be perfectly consistent with the language and goals of the FLSA as well as the regulations surrounding it. The restriction that time off for overtime be granted within the same pay period as earned mirrors the stricture placed upon monetary payments for overtime.[10]

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[9] CCH Lab. L. Rep. (Wages-Hours) ¶ 30,924 at 42,309 (1966-1969 Transfer Binder). *See also* Opinion Letter No. 868 (October 18, 1968), CCH Lab. L. Rep. (Wages-Hours) ¶ 30,877 at 42,273 (1966-1969 Transfer Binder) (applying the same concepts to Colorado's compensatory time off program).

[10] The Department of Labor's official interpretation on the timing of overtime compensation reads:

"There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that *over-*

(Footnote continued on following page)

In fact, this restriction ensures that compensatory time off achieves the main objective of the FLSA's overtime compensation provision: the broadening of employment. That goal could be easily defeated if the employer were allowed discretion to manipulate the scheduled time off so as to coincide with off-season or slack work periods. Moreover, a program of compensatory time off also attains the secondary objective of the FLSA's overtime provision which is that the worker will be compensated for the burden of overtime work. Under such a program, the worker is assured of receiving his fixed salary, even though he has worked less than the total number of hours required at regular pay rates to earn that salary.[11]

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time compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next pay day after such computation can be made . . . ." 29 C.F.R. 778.106 (1972). (emphasis added).

See also Walling v. Harnischfeger Corp., 325 U.S. 427, 432-433 (1945), creating an exception for the payment *of the 50% premium* "[i]f the correct overtime compensation cannot be determined until some time after the regular pay period . . .".

[11] The district court provided an excellent illustration of the manner in which a compensatory time off program would function:

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Nor does this restricted compensatory time off program offend the Wage and Hour Division's interpretation of the mode of payment for overtime. 29 C.F.R. § 531.27 (1974). This regulation requires that, with certain limited exceptions not applicable to this case, overtime compensation is to be paid in cash or negotiable instruments payable at par. The compensatory time off program fulfills this condition since the overtime worked is paid at the time and a half rate in cash. See note 11, supra. Under the compensatory time off program, it makes no difference whether we view the overtime as a triggering mechanism for the accrual of either time off or additional wage compensation. They are, in fact, opposite sides of the same coin. The incremental salary benefit, computed at overtime rates, is merely offset by laying off the employee for the exact period necessary to earn that increment while working at regular rates.

For these reasons, we hold that a program of compensatory time off, subject to the restriction that the time off be afforded during the same pay period, is permissible

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"For example, given a pay period of two weeks, with a fixed salary of $200.00 per week and a fixed workweek of forty hours, an employee works for fifty hours during the first week of the pay period. Under the above Opinion Letter, the employee may then work only twenty-five hours in the second week of the pay period (forty hours less time and one-half for the ten hours accrued overtime) while receiving his full gross pay of $400.00 at the end of the two-week pay period. This would comply with §7 of the Act and the accompanying regulations and interpretations, since such wages are paid both promptly and in cash." 364 F. Supp. 156 at 158.

under the Fair Labor Standards Act. Accord, *Hodgson* v. *A. W. Crossley, Inc.*, 365 F. Supp. 1131, 1134 (S.D. N.Y. 1973). See *United States* v. *Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 491-492 (2d Cir. 1960).

III.

Applying these precepts to the New Jersey statute challenged in the case at bar, we must conclude that the manner in which this statute is administered fails to meet the exacting standards of the FLSA. While the statute itself, like the FLSA, does not prescribe a definite period within which overtime compensation must be made,[12] appellants have conceded that their employees are often not afforded compensatory time off within the same pay period as earned.[13]

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[12] We cannot accept appellants' argument that Walling v. Harnischfeger Corp., supra, permits delay in the "payment" of overtime compensation whenever such payment hampers the efficiency of the employer's business. The ruling in that case is limited to the payment of *the overtime premium* in instances where it is *administratively impossible* to determine or compute the correct overtime compensation within the regular pay period. New Jersey has not demonstrated that such a determination is administratively infeasible in this case. Rather its assertion that state hospitals would operate more efficiently if "payment" of the time off were delayed ignores the primary purpose of the FLSA—to increase employment. We emphasize that increased employmeent and the state's maintenance of adequate health care services within budgetary constraints are mutually compatible not inherently contradictory goals

[13] *See e.g.*, Notes of Oral Argument of "Hearing on Defendant's (sic) Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment", July 17, 1973, pp. 4 and 5.

Our analysis, however, does not end with that concession. We turn, instead, to a consideration of appellants' contentions that: (1) their compensatory time off program is exempted from the FLSA under 29 U.S.C. § 218 because it provides a "higher standard" than the FLSA; (2) federal restriction of compensatory time off programs constitutes "undue interference" with state operations and is prohibited by the Tenth Amendment; and (3) even if New Jersey must yield to the FLSA's regulations, retroactive payments of overtime compensation, as ordered by the district court, are invalid under the Eleventh Amendment or are inappropriate in this case. Though they are unpersuasive, we believe these arguments deserve brief examination.

Appellants urge that the New Jersey compensatory time off program is salvaged by 29 U.S.C. § 218(a) which prohibits noncompliance with state laws establishing higher standards than the FLSA's. They insist that the New Jersey statute was enacted in response to the demands of employees desiring the option of receiving either cash or time off for overtime work. They reason that, since employees are not forced to take their time off within the same pay period, this allows them to coordinate vacation schedules and personal obligations with their time off. This option and the scheduling flexibility provided by the New Jersey statute, appellants argue, make their program more beneficial than the FLSA's to state employees.

The New Jersey statute, however, does not fall within the purview of 29 U.S.C. § 218(a). First, the additional benefits are not necessarily available to the employee since the state has admitted that the discretion as to whether the employee's overtime compensation is cash or time off

rests with the state, not with the employee.[14] Second, and more importantly, § 218(a) does not provide protection or programs which, while containing benefits other than those accorded by the FLSA, do not meet and exceed the specific terms of the FLSA. As we noted earlier, § 218(a) was devised to ensure that the FLSA would not inhibit programs providing higher minimum wages or lower maximum hours than the FLSA. Nor does the FLSA preempt state or local regulations benefiting workers not covered by the FLSA. *Maldonado* v. *International Business Machine Corp.*, 56 F.R.D. 452, 455 (D.P.R. 1972). According benefits supplemental to those of the FLSA does not justify the failure to comply with the FLSA. In that sense, compliance with the FLSA's standards is a *sine qua non* to exemption under § 218(a).[15]

Alternatively, appellants suggest that the nature of their businesses provides an exception to the FLSA's immediacy of payments requirement. They suggest that, since their operations are not subject to slack work or seasonal periods, they cannot possibly manipulate the scheduling

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[14] See Notes of Oral Argument, supra at pp. 7 and 8. See also Personnel Circular 70-8, Appellants' Appendix, p. 62a. Though the record is unclear, the state apparently exercises similar control over when the compensatory time off is taken. In fact, the contrary practice would gainsay the state's assertion that its administrative control of the time off program is essential to both the maintenance of adequate health care and the efficiency of the appellant institutions.

[15] We summarily reject appellants' conclusion that various internal regulations of New Jersey's program (e.g., that where possible time off will be afforded in the same week as earned and that accrued compensatory time off is limited to sixty hours) justify its exemption from the FLSA.

of time off so as to defeat the broadening-of-employment objective of the FLSA. Therefore, the requirement of payment of overtime compensation within the same pay period serves no useful purpose. While this argument is both ingenious and appealing, we cannot accept it. Appellants produced no evidence in the district court to demonstrate either the non-seasonal nature of their operations or the increased employment which has resulted from delayed compensatory time off. Moreover, even if we were to take judicial notice of the nature of their operations, we are powerless to legislate such exceptions by judicial fiat. In fact, explicit Congressional exemptions from the FLSA are narrowly construed. *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). Where, as in the case at bar, there is no exemption and the regulations interpreting the FLSA are reasonably designed to fulfill its purposes, judicial intervention is unwarranted. The proper forum for consideration of this argument is the legislature, not the judiciary.[16]

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[16] Congress has, in fact, demonstrated an awareness of the unique nature of hospital operations by providing the following exception in 29 U.S.C. §207(j):

> "No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of 14 consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess

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Appendix C

When Congress amended the FLSA in 1966 by withdrawing the total exemption formerly granted governmental operations and regulating governmental operations of hospitals, schools, and institutions, a constitutional attack was mounted against this enlargement of the FLSA on the ground that it interfered with "sovereign state functions" and was, therefore, prohibited by the Tenth Amendment.[17] The Supreme Court rejected this argument

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> of eight hours and (sic) any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed."

The impact of this subsection on a compensatory time off program may be demonstrated by the following example:

> Assume a pay period of two weeks with a fixed salary of $200.00 per week and a fixed workweek of forty hours in which an employee works eight hours per day for the first seven days of the pay period. If the hospital does not have an agreement under §207(j), the employee may work only sixteen hours (forty hours less time and one-half for the sixteen hours accrued overtime) during the next seven days, assuming he does not work more than eight hours on any day. He would, of course, receive his full gross pay of $400.00 at the end of the pay period. If the hospital has an agreement under §207(j), the employee may work as much as twenty-four hours (eighty hours less fifty-six hours) during the ensuing seven days assuming no more than eight hours of work per day. Again, his gross pay would be $400.00 at the end of the two week pay period.

[17] The Tenth Amendment to the Constitution of the United States reads:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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in *Maryland* v. *Witz,* 392 U.S. 183 (1968), holding that the Commerce Clause granted Congress power to enact such modifications and that the particular exercise of power in this instance was a valid regulation of commerce. Appellants concede the validity of *Maryland* v. *Witz,* supra, but maintain that a particular FLSA regulation of state activities may be so unyielding as to violate the Tenth Amendment, even though Congressional power to provide some regulation of those same activities is undisputed. See also *Fry* v. *United States,* 43 U.S.L.W. 4651 (U.S. May 27, 1975) (No. 73-822). They assert that the requirement that overtime compensation be provided within the same pay period as earned represents such an instance because of its draconian effect on state finances. We cannot agree for, as we have pointed out, this restriction is rationally related to the purposes and language of the FLSA. To hold otherwise would result in the paradoxical ruling that, while Congress has the constitutional power to regulate specified activities, reasonable administrative interpretations of that admittedly legitimate exercise of power cannot be allowed.

Finally, appellants submit that, even if the New Jersey program is invalid, the district court's order that appellants pay retroactive overtime compensation is either invalid or inappropriate. They premise this contention on two arguments: (1) that the Eleventh Amendment bars retroactive relief in damages against the state and (2) that such relief, even if within the powers of the district court, should not have been granted in this particular case. We will examine these arguments *seriatim.*

Appendix C

IV.

Appellants raised an Eleventh Amendment [18] defense to this suit in their answer to the Secretary's complaint. This defense was rejected by the district court. Acting *sua sponte,* we requested and received supplemental briefs from the parties on the Eleventh Amendment issue as affected by the Supreme Court's ruling in *Edelman* v. *Jordan,* 415 U.S. 651 (1974). We now hold that the Eleventh Amendment and the extension of sovereign immunity in *Hans* v. *Louisiana,* 134 U.S. 1 (1890), do not bar the district court's order of retroactive relief in damages in this case.

In *Employees* v. *Missouri Public Health Dept.,* 411 U.S. 279 (1973), the petitioners were employees of state health facilities who brought suit for overtime pay due them under § 16(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)) and damages. The action was dismissed as it was without the consent of the State of Missouri and therefore barred by the doctrine of sovereign immunity. The Court of Appeals for the Eighth Circuit affirmed as did the Supreme Court.

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[18] The Eleventh Amendment, a constitutional reversal of Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizen or Subjects of any Foreign State."

Hans v. Louisiana, 134 U.S. 1 (1890) extended the states' immunity to suit to actions brought by a state's own citizens against the state in federal court without the consent of the state.

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Mr. Justice Douglas, writing for the majority, concluded that the petitioners came within the scope of the FLSA under the 1966 Amendments to that statute. 411 U.S. at 283. Their inclusion within the FLSA, however, did not amount to a license of state employees to sue the States in federal courts on claims arising under the FLSA:

"But we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts. The *Parden* opinion[19] did state that it would be 'surprising' to learn that Congress made state railroads liable to employees under the FELA, yet provided 'no means by which that liability may be enforced.' 377 U.S., at 197. It would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old § 16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away. It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.

"By holding that Congress did not lift the sovereign immunity of the States under the FLSA, we do not make the extension of coverage to state employees meaningless. *Cf. Parden . . . supra,* at 190. Section 16(c) gives the

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[19] Parden v. Terminal R. Co., 377 U.S. 184 (1964).

Secretary of Labor authority to bring suit for unpaid minimum wages or unpaid overtime compensation under the FLSA. Once the Secretary acts under § 16(c), the right of any employee or employees to sue under § 16(b) terminates. Section 17 gives the Secretary power to seek to enjoin violations of the Act and to obtain restitution in behalf of employees. Sections 16 and 17 suggest that since private enforcement of the Act was not a paramount objective, disallowance of suits by state employees and remitting them to relief through the Secretary of Labor may explain why Congress was silent as to waiver of sovereign immunity of the States. For suits by the United States against a State are not barred by the Constitution. See *United States* v. *Mississippi,* 380 U.S. 128, 140-141. In this connection, it is not amiss to note that § 16(b) allows recovery by employees, not only of the amount of unpaid wages, but of an equal amount as liquidated damages and attorneys' fees. It is one thing, as in *Parden,* to make a state employee whole; it is quite another to let him recover double against a State. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly. The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor." (notes omitted; bracketed material added). 411 U.S. at 285-286.

Thus, the Supreme Court has recognized, albeit in *dictum,* the right of the Secretary of Labor to sue the

States on behalf of state employees in federal courts on claims involving the FLSA.[20]

More recently, the Supreme Court commented upon the Eleventh Amendment and the doctrine of sovereign immunity in *Edelman* v. *Jordan,* 415 U.S. 651 (1974). That case arose under the Federal-State Program of Aid to the

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[20] We believe it noteworthy that Congress amended 29 U.S.C. §216(b) in 1974, effective May 1, 1974, to allow employees to sue for double damages and attorneys' fees "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." §6(d)(1), Pub. L. No. 93-259 (April 8, 1974). This right, like that previously accorded, is subject to termination upon the filing of suit by the Secretary of Labor under 29 U.S.C. §217. The amendments to §216(b) since the decision in Employees, supra, do not, however, affect this case. We express no opinion, of course, as to any constitutional issues which they may raise. The Eleventh Amendment issue of private citizens' right to sue the state has been raised in an appeal pending before the United States Supreme Court. The National League of Cities, et al. v. Brennan, supra, at note 6. *See generally* Sarteschi v. Burlein, 508 F.2d 110 (3d Cir. 1975). The legislative history of the 1974 Amendments to the FLSA makes clear the fact that the amendment to this section was expressly designed to overcome the ruling in Employees, supra. U.S. Code, Congressional and Administrative News, Vol. 2, 93d Cong. 2d Sess. 1974, at 2850, 2853. No substantial constitutional issue is presented here.

It deserves mention that the 1974 Amendments to the FLSA deleted the requirement, previously contained in 29 U.S.C. §216 (c), that suit by the Secretary on behalf of such employees be preceded by a written request of those employees claiming unpaid compensation. §26, Pub. L. No. 93-259 (April 8, 1974).

As noted, neither of these amendments affects the instant case since it was filed before the effective date of the 1974 Amendments and involves conduct prior to that time.

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Aged, Blind and Disabled (AABD), funded equally by state and federal governments. Illinois Public Aid Code, Ill. Rev. Stat., c. 23, §§ 3-1 through 3-12 (1973). *Edelman,* a class action, was brought by Jordan for the alleged wrongful withholding by Illinois state officials of AABD benefits. The district court issued a permanent injunction requiring compliance with the federal regulations and ordering payment of benefits wrongfully withheld. On appeal, the Court of Appeals of the Seventh Circuit held in substance that retroactive benefits could be awarded eligible welfare applicants on the theory that the relief constituted an award of "damages", and that even if the Eleventh Amendment sovereign immunity doctrine was applicable, Illinois had constructively consented to the suit and to such a judgment by participating in the federal AABD program. *Jordan* v. *Weaver,* 472 F.2d 935 (1973). The Supreme Court reversed as to the award of retroactive benefits, holding that the Eleventh Amendment barred that portion of the district court's order decreeing retroactive payments since the state had not consented to suit. The Court explained that *Ex parte Young,* 209 U.S. 123 (1908), had awarded only prospective relief and precluded a retroactive award even though the award represented "equitable restitution." Consequently, the Circuit Court's reliance upon *Young* was misplaced. The Supreme Court, citing *Ford Motor Co.* v. *Department of the Treasury of Indiana,* 323 U.S. 459 (1945), also held that an award directed against a state official individually, which could be satisfied only from general revenues of the State, was indistinguishable from an award of damages against the State. The Court then held that Illinois did not consent to suit, and thereby waive its Eleventh Amendment immunity, simply by participating in the AABD program.

Appendix C

Appellants contend with some force that the practical consequences of an award of damages in the instant suit are identical to those which were barred in *Edelman*—i.e., the state fisc is diminished for the benefit of private citizens. They argue that the rationale of the *Edelman* decision is that the status of the nominal parties does not control with respect to the validity of a money judgment under the Eleventh Amendment. They urge, instead, that the determinative element is the question of whose pocketbooks are affected.

Though there is much logic to the appellants' position, we cannot accept it. Careful consideration of questions of sovereign immunity involves numerous factors, including the identities of the parties to the suit, whether the State has consented to suit, the purposes effectuated by the suit (particularly those permitted by legislative fiat), the nature of the activities involved, the type of relief sought, and the source and destination of money damages flowing from the action. Some factors may, by themselves, be determinative. The question of consent is an example. Others, such as the nominal status of the parties, must be considered in arriving at a decision as to the applicability of sovereign immunity, though they do not *per se* require a certain result.

We should remember that "[t]he life of the law," as Mr. Justice Holmes stated, "has not been logic: it has been experience." Holmes, *The Common Law* (33d ed. 1938), p. 1. For over eighty years the courts have held without question that the States' immunity to suit in the federal courts whether in the light of the Eleventh Amendment or under the doctrine of *Hans* v. *Louisiana,* supra, decided in 1890, does not reach suits brought by the United States. *Department of Employment* v. *United*

States, 385 U.S. 355, 358 (1966); *United States* v. *Mississippi,* 380 U.S. 128, 140-141 (1965); *United States* v. *California,* 297 U.S. 175, 184-185 (1936); *Board of Trustees* v. *United States,* 289 U.S. 48, 56-60 (1933); *Sanitary District* v. *United States,* 266 U.S. 405, 425-426 (1925); *United States* v. *Texas,* 143 U.S. 621, 641-646 (1892).[21] It seems most unlikely that the Supreme Court would now change the law and hold that, since individual employees will be the ultimate beneficiaries of a suit such as that at bar, the instant suit will be treated as if it had been brought by individuals against the State of New Jersey rather than by the Secretary of Labor. Moreover, the fact that a suit is brought by an official of the United States rather than by the United States itself in its own name certainly does not militate against the theory that suits brought by the Secretary of Labor to enforce the FLSA have been treated as suits by the United States. *Brennan* v. *Iowa,* 494 F.2d 100, 103 (8th Cir. 1974) cert. denied, 43 U.S.L.W. 3643 (U.S. June 9, 1975) (No. 73-1565); *Mitchell* v. *Robert DeMario Jewelry, Inc.,* 260 F.2d 929, 932 (5th Cir. 1958), reversed on other grounds, 361 U.S. 288 (1960); *Mitchell* v. *McCarty,* 239 F.2d 721, 724 (7th Cir. 1957); *Walling* v. *Frank Adam Electric Co.,* 163 F.2d 277, 283 (8th Cir. 1947); *Walling* v. *Norfolk Southern Ry. Co.,* 162 F.2d 95, 96 (4th Cir. 1947). Indeed in *Employees* the Supreme Court observed that while Congress had not intended individual employees to sue the State under 29 U.S.C. § 216(b), this

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[21] We do not agree with appellants' assertion that these cases are inapposite because none involved suit by the United States brought primarily for the benefit of a private party. As we have explained, there are a number of factors which mandate the allowance of damages in this case.

conclusion was consistent with the expanded application of the Act to state institutions against which the Secretary brought suit. The Court stated at 411 U.S. 285: "By holding that Congress did not lift the sovereign immunity of the States under the FLSA, we do not make the extension of coverage to state employees meaningless. . . . [The Act] gives the Secretary of Labor authority to bring suit. . . . . [S]uits by the United States against a State are not barred by the Constitution. See *United States* v. *Mississippi,* 380 U.S. 123, 140-141." See also *National Labor Relations Board* v. *Finch Co.,* 404 U.S. 138, 145-146 (1971). Conversely, the result in *Edelman* was premised upon the rule that "a suit by *private parties* seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." 415 U.S. at 663 (emphasis added).

It is apparent that the United States has a substantial interest under the Commerce Clause in making certain that employees of the States are properly compensated. *Maryland* v. *Witz,* 392 U.S. at 195. It is obvious, too, that the allocation of money damages against the States benefits not only the employees but aids substantially in the enforcement of the FLSA. This is particularly true in terms of the pre-1974 FLSA since that statute, as the Supreme Court noted in *Employees,* 411 U.S. at 286, was not particularly reliant upon private enforcement. We may assume that the provision authorizing suits by the Secretary was, likewise, based upon Congressional sensitivity to the delicacy of our federal system, 411 U.S. at 286. Whatever changes may have been wrought in this regard by the 1974 Amendments, we cannot say that Congress' belief that suits by the Secretary were essential to ensure the compliance of public and private employers

with the FLSA is or has become constitutionally insignificant.

We conclude that the allowance of retroactive monetary damages against the State in this case was constitutionally permissible. Suits by the Secretary of Labor against the States under the FLSA seeking money damages on behalf of state employees are a legally proper method of ensuring the effectiveness of a constitutional exercise of Congressional power pursuant to the Commerce Clause. See generally Comment, "The Elusive Eleventh Amendment and the Perimeters of Federal Power", 46 Univ. of Colorado L. Rev. 211 (1974); Comment, "The Eleventh Amendment and Retroactive Welfare Benefits", 36 Univ. Of Pittsburgh L. Rev. 78 (1974).

We turn now to appellants' contention that retroactive relief in damages was inappropriate within the context of this particular case. There can be no doubt that, under 29 U.S.C. §§ 216 and 217, the power to grant such restitution lies with the district court and is subject to its determination that restitution will: (1) aid in enforcement of the FLSA by depriving violators of ill-gotten gains and (2) protect employers who have complied with the FLSA against the competition with employers who have not. See e.g., *Wirtz* v. *Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968). Appellants' contention that neither purpose would be served by providing restitution in this case is without merit. Restitution awards provide a deterrent to those who would fail to comply with the FLSA and whose failure to do so would result in unfair competitive advantage. Though appellants' "gains" may indirectly have resulted in maintenance of adequate health care services, a ruling that restitution is unnecessary would prompt employers to ignore the terms and regulations of the FLSA without

fear of restitution payments. We are aware that remedial legislation should be interpreted broadly, but we conclude that the position taken by the appellants is impermissible.[22] The district court did not err in ordering restitution in this case.[23]

V.

Despite these rulings which affirm the essence of the district court's opinion, we are required to vacate that portion of the district court's order mandating computation of overtime pay from February 1, 1969. While the Secretary raised the issue of the statute of limitations in his answer, neither party addressed this point in the

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[22] *Compare* Brennan v. Iowa, 494 F.2d 100, 104-105 (8th Cir. 1974), cert. denied, 43 U.S.L.W. 3643 (U.S. June 9, 1975) (No. 73-1565) holding that a restitution order against the State of Iowa was appropriate where the parties had previously stipulated to such an award in the event that the Secretary of Labor prevailed. There, as here, the Court considered and rejected the argument that restitution should be denied because of financial hardship upon the State.

[23] In determining the amount of overtime compensation to be awarded, the district court may wish to consider the circumstance that some of these employees have already received, although not within the required pay period, overtime compensation in the form of one-and-one-half hours off for each hour of overtime worked. *See* Thomas v. Louisiana, 348 F. Supp. 792 (W.D. La. 1972); *cf.* Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948); Gangi v. D. A. Schulte, 150 F.2d 694, 697 (2d Cir. 1945), aff'd 328 U.S. 108 (1946); Bergschneider v. Peabody Coal Co., 142 F.2d 784 (7th Cir. 1944); Bumpus v. Continental Baking Co., 124 F.2d 549, 553 (6th Cir. 1941), *cert. denied* 316 U.S. 704 (1942). But *cf.* Roland Electrical Co. v. Black, 163 F.2d 417 (4th Cir. 1947).

appeal before us. We emphasize that, under the statute of limitations in effect at the time this suit was filed, any action for unpaid overtime compensation under FLSA must have been commenced within two years after the cause of action accrued or, in the event the violation be deemed "willful", within three years of the accrual of the cause of action. 29 U.S.C. § 255(a) (now cited as § 6, 61 Stat. 87 as amended by Act of September 23, 1966, Pub. L. No. 89-601(b), 80 Stat. 844). The complaint in this case was filed on October 1, 1971. Therefore, if the violation was *not* willful, payments may only be made retroactive to October 1, 1969. *Wirtz* v. *Chase,* 400 F.2d 665, 669 (6th Cir. 1968). If the violation was willful, the court may order back payments extending to October 1, 1968 in which event the order made here would be appropriate.[24] However, the district court never found the violation to have been willful. The sole intimation in the record of such a finding is the court's order. Indeed, the Secretary's complaint did not allege the violation to be willful, and the record is barren of any consideration whatsoever of that issue.

In framing an appropriate order, the district court should remain cognizant of the fact that appellant Vineland State School ("Vineland") was added as a defendant by *consent order* of May 7, 1973. The order specifically provided that the amendment will *not* relate back to the filing of the original complaint. Thus, any order directing Vineland to make back payments may extend only to May 7, 1971, if the violation was not willful.

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[24] The Secretary's complaint alleged that appellants were violating the FLSA since February 1, 1969. Appellants' answer denied this allegation. The record does not establish the exact date when New Jersey implemented the program of compensatory time off. On remand, evidence should be taken on this point.

VI.

We are not insensitive to the plight of the States and their institutions when Congressional actions, however valid, increase their fiscal burdens in substantial, even dramatic fashion. In such instances, though, resort lies in the legislature, not the judiciary. We believe, as we noted, that Congress is not oblivious to this situation. See note 16, supra. If appellants believe that a Congressional exemption will permit enactment of programs which meet the purposes of FLSA without causing drastic financial consequences, they should apply for relief in the halls of Congress.

By our holding, we simply reiterate what the Supreme Court emphasized in *Employees,* 411 U.S. at 284-285:

> *"And when Congress does act, it may place new or even enormous fiscal burdens on the States. . . .* We deal here with problems that may well implicate elevator operators, janitors, charwomen, security guards, secretaries and the like in every office building in a State's governmental hierarchy. Those who follow the teachings of *Kirschbaum* v. *Walling, supra,* and see its manifold applications will appreciate how pervasive such a new federal scheme of regulation would be." (emphasis added).

The judgment of the district court will be affirmed with respect to its determinations that FLSA was violated and that restitution damages should be awarded. We will vacate that portion of the order requiring back payments from February 1, 1969 and remand for a modification of the judgment not inconsistent with this opinion and for a determination of the damage award. See note 23, supra.

Appendix C

ADAMS, *Circuit Judge,* concurring.

I join the comprehensive opinion of Judge Biggs with respect to all the issues presented here except the question of the effect of the Eleventh Amendment upon the Secretary of Labor's quest for a retrospective award of unpaid overtime compensation. Regarding that aspect of the case, a separate statement appears appropriate because my conception of the troublesome and important sovereign immunity issue diverges somewhat from the ideas expounded in the majority opinion.

The Eleventh Amendment[1] was adopted, at least in part, in order to enhance the public weal by providing the states with constitutional protection against interference with the efficacious discharge of their governmental functions by the dissipation of the state treasury.[2] Although some commentators have disputed the contemporary utility for retaining such a palisade around the state sovereign,[3] the Eleventh Amendment remains an integral

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[1] U.S. Const. amend. XI:

> The judicial Power of the United States shall not be construed to extend to any suit at law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign state.

[2] *See* J. Goebel, Jr., 1 Holmes' Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, 741 et seq. (1971); Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 19 (1963).

[3] *See* Note, The Eleventh Amendment and Retroactive Welfare Benefits, 36 U. Pitt. L. Rev. 78, 94, 104-107 (1974); *cf.* Reeves, Leviathan Bound-Sovereign Immunity in a Modern World, 43 U. Va. L. Rev. 529 (1957).

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part of the Constitution. Notwithstanding the precise wording of the amendment, the Supreme Court has long held that, in the absence of consent, suits against a state by citizens of that state are barred as well as suits by citizens of other states.[4]

The immunity of the states is not all-encompassing, however. Neither the Eleventh Amendment nor notions of state sovereignty have been held to proscribe suits against a state by the United States[5] or by an official acting on behalf of the federal government.[6] Also, the Supreme Court has declared that Congress in the exercise of its interstate commerce power has the constitutional authority to subject the states to suits by their citizens.[7]

After Congress extended the Fair Labor Standards Act so as to cover state employees who worked in schools, hospitals and mental institutions, the Supreme Court was presented in Employees v. Missouri Public Health Dept.[8] with the question whether sovereign immunity forestalled such state employees from initiating suit in the federal

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[4] Hans v. Louisiana, 134 U.S. 1 (1890); Edelman v. Jordan, 415 U.S. 651 (1974).

[5] *See* United States v. Mississippi, 380 U.S. 128 (1965).

[6] Brennan v. Iowa, 494 F.2d 100, 103 (8th Cir. 1974), *cert. denied* 43 U.S.L.W. 3643 (U.S., June 9, 1975); Walling v. Norfolk Southern Ry., 162 F.2d 95 (4th Cir. 1947).

[7] Parden v. Terminal Ry., 377 U.S. 184 (1964); Employees v. Missouri Public Health Department, 411 279, 285-87 (1973); Edelman v. Jordan, 415 U.S. 651, 671-74 (1974).

[8] 411 U.S. 279 (1973).

courts to recover unpaid overtime compensation plus an equal amount in liquidated damages. In an opinion holding that the Court would not presume a congressional intent to enable an individual citizen to sue a state in federal court when such actions are not indispensable to the effective implementation of the legislative scheme, Justice Douglas averred, in a statement not indispensable to the conclusion reached in the case:

> By holding that Congress did not lift the sovereign immunity of the States under the FLSA, we do not make the extension of coverage to state employees meaningless. . . . Section 16(c) gives the Secretary of Labor authority to bring suit for unpaid minimum wages or unpaid overtime compensation under the FLSA. . . . Section 17 gives the Secretary power to seek to enjoin violations of the Act and to obtain restitution in behalf of employees. Sections 16 and 17 suggest that since private enforcement of the Act was not a paramount objective, disallowance of suits by state employees and remitting them to relief through the Secretary of Labor may explain why Congress was silent as to waiver of sovereign immunity of the States. For suits by the United States against a State are not barred by the Constitution.[9]

As an indicium of legislative intent with respect to the imposition of liability upon the states, Justice Douglas looked to the need to award damages against the states in order to enforce the Act. In the present case the congressional intent embodied in the FLSA seems unclear, since

[9] 411 U.S. at 285-86.

there appears to be some doubt regarding the necessity of the award of retrospective overtime compensation in addition to injunctive relief in order to effectuate compliance by the states with the FLSA. Therefore, I continue to be concerned whether Congress, at the time of the 1966 amendments,[10] intended to inflict financial burdens of this kind upon the states.

The Supreme Court, however, has declared, albeit only in dictum, that the sovereign character of the states does not foreclose the Secretary of Labor from obtaining for the benefit of state employees a money judgment for unpaid overtime compensation, thereby achieving indirectly what the state employees could not accomplish for themselves. It seems inappropriate for this Court, as opposed to the Supreme Court, to enter a ruling which would be in derogation of the import of such language.

Accordingly, I concur in the judgment of the Court affirming the decision of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[10] The 1974 amendments to the FLSA were not in effect during the period in which the events forming the basis of this litigation took place. Therefore, the legislative intent manifested in *that* enactment is not relevant to this appeal.

APPENDIX D

Notice of Appeal to United States Court of Appeals for the Third Circuit

(Filed—February 11, 1974)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action

File No. 1457-71

PETER J. BRENNAN, Secretary of Labor Successor to JAMES D. HODGSON United States Department of Labor,

Plaintiff,

v.

THE STATE OF NEW JERSEY, ANCORA PSYCHIATRIC HOSPITAL, GREYSTONE PARK PSYCHIATRIC HOSPITAL, TRENTON PSYCHIATRIC HOSPITAL, NEW JERSEY NEUROPSYCHIATRIC INSTITUTE and VINELAND STATE SCHOOL,

Defendants.

Notice is hereby given that the State of New Jersey, et al., defendants, hereby appeal to the United States Court of Appeals for the Third Circuit from the Order

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of Partial Summary Judgment entered in this action on the 11th day of December, 1973.

Dated: February 11, 1974

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
By: THEODORE A. WINARD
Assistant Attorney General

APPENDIX E

Order of Partial Summary Judgment and Stay of Judgment of United States District Court for the District of New Jersey

(Filed—December 11, 1973)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PETER J. BRENNAN, Secretary of Labor Successor to JAMES D. HODGSON United States Department of Labor,

Plaintiff,

v.

THE STATE OF NEW JERSEY, ANCORA PSYCHIATRIC HOSPITAL, GREYSTONE PARK PSYCHIATRIC HOSPITAL, TRENTON PSYCHIATRIC HOSPITAL, NEW JERSEY NEUROPSYCHIATRIC INSTITUTE and VINELAND STATE SCHOOL,

Defendants.

This cause having come on to be heard on motions of plaintiff and defendants for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings in the action, the memoranda of law submitted by the parties, in support of the motions, and having heard oral argument and having found that there is no genuine issue

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of fact to be submitted to the trial court, and having concluded that plaintiff is entitled to partial summary judgment as a matter of law, and having set forth the rational for said conclusion in the Opinion of the Honorable George H. Barlow, United States District Judge, said Opinion having been filed with this court on October 1, 1973, it is pursuant to said Opinion

ORDERED that plaintiff's motion for partial summary judgment is in all respects granted and defendants' motion for partial summary judgment is in all respects denied; and it is further

ORDERED that there is no just reason for delay and that plaintiff is entitled to the entry of a final judgment as a matter of law in accordance with Rule 54(b) of the Federal Rules of Civil Procedures, and it is

ORDERED, ADJUDGED AND DECREED:

(1) That the defendants, The State of New Jersey, Ancora Psychiatric Hospital, Greystone Park Psychiatric Hospital, Trenton Psychiatric Hospital, New Jersey Neuropsychiatric Institute and Vineland State School, their officers, agents, servants, employees an those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise be, and they hereby are, permanently enjoined and restrained from violating the provisions of section 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. 201 et seq.), hereinafter called the Act, in the following manners:

(a) Defendants shall not, contrary to section 7 of the Act, employ any of their employees who are in any workweek employed in an enterprise engaged in commerce or

in the production of goods for commerce, within the meaning of the Act, for a workweek longer than forty (40) hours unless such employee receives compensation for his employment in excess of forty (40) hours during a workweek at a rate not less than one and one-half times the regular rate at which he is employed;

(b) Defendants shall, in accordance with section 7 of the Act, promptly pay their employees, for the overtime hours worked, in cash or negotiable instruments payable at par, and shall pay the overtime compensation as it is earned and in the pay period in which the overtime hours are worked;

(c) Defendants shall proceed promptly to determine from defendants' time and payroll records the amounts owing to employees which amounts have been withheld by virtue of the failure of the defendants to pay overtime as it is earned and in the pay period in which overtime hours are worked, from February 1, 1969 up to the date hereof, as is required by section 7 of the Act, with interest at six percent per annum. Said determination of amounts owing to employees shall be submitted to counsel for the plaintiff by December 20, 1973 and shall be subject to the agreement of the plaintiff and to the supervision of the Court. The computations shall identify by name, address, and social security number, the affected employees and shall state the amounts due to each employee. Said computations shall be incorporated in the court's judgment by appropriate supplemental order within thirty days after their submission to the plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED that the amounts owing to employees shall be paid within a reasonable period

of time as agreed upon by the parties after the date of the entry of the aforesaid supplemental order providing for such payments, in the total amounts set forth in the supplemental order to be due each underpaid employee, less legal deductions required by law; and it is further

ORDERED, ADJUDGED AND DECREED that any monies due employees and not so distributed by plaintiff within a reasonable time because of plaintiff's inability to locate the proper persons or such persons' refusal to accept such money within the period of one year shall be deposited with the Clerk of the Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. 2041; and it is further

ORDERED, ADJUDGED AND DECREED that all proceedings on the part of the plaintiff to enforce the judgment entered herein insofar as it enjoins and restrains the defendants from violating the provisions of section 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. 201 et seq.), be stayed for a period of not more than sixty days or until the filing of an appeal to the United States Court of Appeals, without costs.

Dated: December 11, 1973
Trenton, New Jersey , 1973.

s/ GEORGE H. BARLOW
United States District Judge

Entry of this order is hereby
consented to and notice of entry
thereof is hereby waived.

THEODORE A. WINARD
Attorney for Defendants
Assistant Attorney General

APPENDIX F

Opinion of the United States District Court for the District of New Jersey

(Filed—October 1, 1973)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1457-71.

PETER J. BRENNAN, Secretary of Labor Successor to JAMES D. HODGSON United States Department of Labor,

Plaintiff,

v.

THE STATE OF NEW JERSEY, ANCORA PSYCHIATRIC HOSPITAL, GREYSTONE PARK PSYCHIATRIC HOSPITAL, TRENTON PSYCHIATRIC HOSPITAL, NEW JERSEY NEUROPSYCHIATRIC INSTITUTE and VINELAND STATE SCHOOL,

Defendants.

BARLOW, *District Judge.*

Appearances: William J. Kilberg, Esquire
Solicitor of Labor
United States Department of Labor
Francis V. LaRuffa, Esquire
Regional Solicitor
United States Department of Labor

Appendix E

By: Laurel J. McKee, Esquire
Supervising Attorney
United States Department of Labor
Attorneys for Plaintiff.

George F. Kugler, Jr., Esquire
Attorney General of the State of New Jersey

By: Theodore A. Winard, Esquire
Deputy Attorney General
Attorneys for Defendants.

This proceeding is brought by the Secretary of Labor pursuant to the provisions of §17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. §217 (1961) (hereinafter referred to as the Act, or FLSA), wherein the Secretary seeks to enjoin violations of §§206, 207, and 215(a)(2) of the FLSA. There being no disputed issue of fact between the parties with regard to the alleged violations of §207 of the Act, this case comes before the Court on partial cross motions for summary judgment. Fed. R. Civ. P. 56.

Defendants are the State of New Jersey and those State Hospitals named in the complaint. While states are normally exempt under the FLSA, such exemption was removed under the 1966 Amendments to the FLSA with respect to State employees in schools, hospitals and institutions. 29 U.S.C.A. §203(d).

Appendix E

Pursuant to N.J.S.A. 52:17.13,[1] the State of New Jersey, through the defendant hospitals, has compensated hospital employees working overtime by means of a plan of compensatory time-off. Under this plan, employees are granted one and one-half hours compensatory time-off for every one hour of overtime worked. While such compensatory time-off may, if possible, be taken during the same week when earned, in practice the demands of these institutions make it impossible for employees to do so. Indeed, the State of New Jersey concedes that it is a practical impossibility for these hospitals to give compensatory time-off in the week in which it is earned without threatening the quality of medical and health services.

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[1] N.J.S.A. 52:14-17.13:

> "The work week for basic annual salary for employees in the State service, insofar as practicable and except as provided in section 2 of this act, shall not be more than 40 hours; and, notwithstanding any inconsistent provisions of law, any employee in the State service who is authorized or required to work in any week more than the hours of work established as the regular and normal work week for that class or agency shall be eligible to receive, at the discretion of the department head with the approval of the State Treasurer, the President of the Civil Service Commission and the Director of the Division of Budget and Accounting in the Department of the Treasury, either (1) compensation for the hours worked in excess of the established work week for that class or agency at a rate representing 1 1/2 times the individual's hourly rate calculated by a proration of the annual salary rate of the individual employee, or (2) compensatory time off at the rate of 1 1/2 hours for each hour worked in excess of the established work week for that class or agency."

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The present dispute centers around the alleged failure of the defendants to comply with the provisions of §7 of the FLSA regarding overtime compensation. Section 7 of the Act, in pertinent parts, provides as follows:

> "(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C.A. §207.

Plaintiff argues that the defendants' practice of allowing employees to take compensatory time-off for overtime hours, as opposed to promptly paying their employees for overtime hours in cash, is violative of §7 of the FLSA. We agree with the plaintiff.

The Administrator of the Wage and Hour Division of the United States Department of Labor has issued two Opinion Letters interpreting §7 of the Act. Opinion Letter No. 913 (December 27, 1968) states:

> "An employer may not credit an employee with compensatory time (even at a time and one-half rate) for overtime earned which is to be taken at some mutually agreed upon later date subsequent to the end of the pay period in which the overtime was earned, rather than pay cash for the overtime as it is earned."

The same interpretation is given by the Administrator in Opinion Letter No. 868 (October 18, 1968). Such administrative interpretations are to be given considerable

weight in construing federal legislative acts. *Idaho Sheet Metal Works* v. *Wirtz,* 383 U.S. 190, 205 (1966), *reh. den.,* 383 U.S. 963 (1966).

Section 531.27 of the Secretary of Labor's determinations and interpretations under the FLSA clearly states that overtime compensation is to be paid in cash or negotiable instruments payable at par. 29 C.F.R. 531.27 (1972). The only exception to the payment of cash overtime is set forth in §3(m) of the Act, wherein the statute allows the employer to include "board, lodging, or other facilities" in computing the wage to be paid. 29 U.S.C.A. §203(m). The term "other facilities" was not meant to include compensatory time. In *Schultz* v. *Hinojosa,* 432 F. 2d 259, 267 (5th Cir. 1970), the Court held that the term "other facilities" should "be considered as being in pari materia with the preceding words 'board and lodging' ". Furthermore, the Department of Labor's interpretations define "other facilities" as "something like board or lodging", and proceed to list examples such as meals, housing, tuition payments, merchandise available at company stores, fuel and transportation. 29 C.F.R. 531.32 (1972).

In his Opinion Letter No. 913 (December 27, 1968), the Wage-Hour Administrator makes reference to what appears to be the sole exception to the general rule against the use of compensatory time:

> "However, it is permissible for the employer employing one at a fixed salary for a fixed workweek to lay off the employee a sufficient number of hours during some other week or weeks *of the pay period* to offset the amount of overtime worked (i.e. at the time and one-half rate) so that the desired wage or salary for the pay period covers the total amount of compensation including overtime." (Emphasis added.)

In fact, this is not really an exception to the rule of §7 of the Act, but is in complete compliance therewith. For example, given a pay period of two weeks, with a fixed salary of $200.00 per week and a fixed workweek of forty hours, an employee works for fifty hours during the first week of the pay period. Under the above Opinion Letter, the employee may then work only twenty-five hours in the second week of the pay period (forty hours less time and one-half for the ten hours accrued overtime) while receiving his full gross pay of $400.00 at the end of the two-week pay period. This would comply with §7 of the Act and the accompanying regulations and interpretations, since such wages are paid both promptly and in cash.

While the plan presently in effect in the named New Jersey hospitals may similarly be construed to constitute cash payments of wages—in the sense that employees are paid in full in cash in subsequent pay periods when compensatory time is taken off—it can in no sense be construed to constitute prompt payment of such wages. The official interpretations of the Department of Labor regarding the overtime pay requirements of §7 of the Act make it clear that promptness of payment is required:

> "There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that *overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends.* When the correct amount of overtime com-

> pensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next pay day after such computation can be made. . . ." 29 C.F.R. 778.106 (1972). (Emphasis added.)

The above section specifically states that overtime payment must be made within the regular pay period, unless for some reason delay is required to allow the employer to compute overtime payments. Where delay is unavoidable, the fifty per cent overtime premium may be paid as soon as practicable, but no delay is permitted in the payment of the employee's regular hourly rate for the overtime hours. *Walling* v. *Harnischfeger Corporation,* 325 U.S. 427 (1945).

The State of New Jersey faces no apparent difficulty in computing the overtime due its employees at the end of each pay period. A simple mathematical computation should allow overtime to be paid in the pay period in which it is worked. Such prompt payment is mandated by § 7 of the Act. *United States* v. *Klinghoffer Bros. Realty Corp.,* 285 F. 2d 487 (2nd Cir. 1960).

The defendant, State of New Jersey, further alleges that the New Jersey overtime statute, N.J.S.A. 52:14-17.13, and its accompanying administrative regulations, present a program of employee benefits more beneficial

to state employees than the scheme presented in § 7 of the FLSA, and, as such, the New Jersey compensatory time-off plan is preserved under § 18 of the Act. Section 18 provides, in its pertinent parts, as follows:

> "(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter. . . ." 29 U.S.C. A. § 218(a).

The express function of this portion of § 18 is to preclude the application of the FLSA where local law provides for a higher minimum wage or for a lower maximum workweek than the existing federal standard. See *Eastern Sugar Associates* v. *Pena,* 222 F. 2d 934 (1st Cir. 1955), *cert. den.* 350 U.S. 900 (1955); *State* v. *Comfort Cab, Inc.,* 118 N.J. Super. 162, 286 A. 2d 742 (Bergen County Ct. 1972).

In their brief, the State of New Jersey relies on the case of *Maldonado* v. *International Business Machine Corp.,* 56 F.R.D. 452 (D.P.R. 1972), in support of their argument that State law must apply whenever it is more beneficial to an employee than the FLSA. However, unlike the case at hand, *Maldonado* does not deal with a situation where an employee is equally covered under both federal and local law and the question is which law should apply. Rather, *Maldonado* is concerned with a situation where the plaintiffs' job status would probably not entitle them to overtime compensation under federal law, but where they would be entitled to such compensa-

tion under local law. Accordingly, the Court held that the law providing the more extensive overtime coverage, the Puerto Rican law, should apply. Such action is consistent with § 18 of the Act. The function of § 18 is to see that the FLSA shall not be used to deny an employee overtime compensation he may be entitled to under local or state law. No such denial occurs upon the application of the FLSA to the facts of the case at hand. As such, the compensatory overtime scheme enacted under N.J.S.A. 52:14-17.13 is not preserved under the provisions of § 18 of the Act.

Finally, the defendant State of New Jersey alleges that the application of the FLSA contrary to the State overtime plan is violative of the Tenth Amendment of the United States Constitution in that it unduly interferes with the performance of a state governmental function and is disruptive of the balance between the State and the federal government.

The decision of the Supreme Court in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), upholding the constitutionality of the 1966 amendments to the FLSA, clearly rejects that contention:

> "Indeed, appellants do not contend that labor conditions in all schools and hospitals are without the reach of the commerce power, but only that the Act may not be constitutionally applied to state-operated institutions because that power must yield to state sovereignty in the performance of governmental functions. This argument simply is not tenable." 392 U.S., at 195.

Nor does the possibility of additional fiscal responsibility on the State government curb the scope of con-

gressional power to legislate. In *Employees of the Department of Public Health and Welfare of Missouri* v. *Department of Public Health and Welfare of Missouri,* 411 U.S. 279 (1973), the Court states:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. *And when Congress does act, it may place new and even enormous fiscal burdens on the States.* . . . We deal here with problems that may well implicate elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy. Those who follow the teachings of *Kirschbaum* v. *Walling, supra,* and see its manifold applications will appreciate how pervasive such a new federal scheme of regulation would be." 411 U.S., at 284-285. (Emphasis added.)

Accordingly, plaintiff's motion for partial summary judgment is granted and defendants' motion for the same relief is denied. An appropriate order will be submitted.

GEORGE H. BARLOW
United States District Judge

APPENDIX G

Statutes and Regulations

The following statutory and regulatory provisions are cited in this case:

I

United States Code, Title 29, Section 207(a)(1) provides:

> "Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

II

United States Code, Title 29, Section 217, provides in pertinent part:

> "The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of pay-

> ment of minimum wages or overtime compensation found by the court to be due to employees under this Act * * *."

III

New Jersey Statutes Annotated, Title 52, Chapter 14, Section 17.13, provides:

> "The work week for basic annual salary for employees in the State service, insofar as practicable and except as provided in section 2 of this act, shall not be more than 40 hours; and, notwithstanding any inconsistent provisions of law, any employee in the State service who is authorized or required to work in any week more than the hours of work established as the regular and normal work week for that class or agency shall be eligible to receive, at the discretion of the department head with the approval of the State Treasurer, the President of the Civil Service Commission and the Director of the Division of Budget and Accounting in the Department of Treasury, either (1) compensation for the hours worked in excess of the established work week for that class or agency at a rate representing 1½ times the individual's hourly rate calculated by a proration of the annual salary rate of the individual employee, or (2) compensatory time off at the rate of 1½ hours for each hour worked in excess of the established work week for that class or agency."

IV

Code of Federal Regulations, Title 29, Section 778.106, provides in pertinent part:

Appendix G

"There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next pay day after such computation can be made. • • •"